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No. 91-1401

Supreme Court, U.S.
FILED
MAR 31 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

BONNIE BOUCHARD; RODNEY WACKER; VICKI DANOWICZ; GARY SEXTON; JACK D. YATES, JR.; LAWRENCE E. YATES; ILA FETT; ROSEMARIE STEEL; DANIEL J. ROSEY; PHYLLIS HENSLEY; KEVIN CARLSON; JEAN PETERS; TAMMY SUE EMPFIELD; LEO F. PROKOP, JR.; DORIS JEAN MEYER; AND PATRICK K. BOUCHARD,

Petitioners,

v.

THE REGIONAL GOVERNING BOARD OF REGION V MENTAL RETARDATION SERVICES AND REGION V MENTAL RETARDATION SERVICES,

Respondents.

KEVIN HUSS; CHRIS AMUNDSON; AND JERRY JUNKER,

Petitioners,

v.

THE REGIONAL GOVERNING BOARD OF REGION V MENTAL RETARDATION SERVICES AND REGION V MENTAL RETARDATION SERVICES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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The respondents, Regional Governing Board of Region V Mental Retardation Services and Region V Mental Retardation Services (collectively "Region V"), request that this Court deny the petition for writ of certiorari, which seeks review of an opinion of the Eighth Circuit Court of Appeals. That opinion is reported at 939 F.2d 1323.

STATEMENT OF THE CASE

Region V agrees with petitioners' Statement of the Case with the following additions:

This action was filed under the private remedies section of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §216(b). The sole issue decided by the Eighth Circuit was whether Region V was entitled to a good faith defense under the Portal-to-Portal Act, 29 U.S.C. §259, when it established work schedules for houseparents working at community residences for the mentally retarded. Because of nationwide confusion over the interpretation of the "sleep time" issue as it applied to residential care staff at community-based mental retardation facilities, the Wage and Hour Division of the United States Department of Labor ("Department") had issued a series of interpretive letters, beginning in 1981. Region V contended that the work schedule it implemented was developed in reliance on, and in conformance with, regulations, opinions, and letter rulings issued by the Department.

The Eighth Circuit concluded that it should "consider whether Region V met the good faith reliance standards

under Section 259, taking into account both the Department's regulations and the agency's letter rulings," using an objective test. 939 F.2d at 1328. The court carefully examined the applicable regulations and letter rulings of the Department and the facts as found by the district court, *Id.* at 1326-1333, and concluded as a matter of law that Region V had established the Section 259 defense as to each category of employee. *Id.* at 1328.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The petition raises only questions of evidence and factual findings which are not important enough to warrant review.

While the petition purports to raise four separate issues, Issues I, II, and IV are merely variants on a single argument: that the Eighth Circuit disregarded factual findings made by the district court and instead made its own factual determinations. The petition argues that the court below erred when it improperly ignored the trial court's factual findings in concluding that Region V acted in good faith reliance (Issue I); improperly ignored a joint stipulation of the parties (Issue II); and made findings not supported by substantial evidence (Issue IV). Even assuming that those arguments are correct, the Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925).

The Eighth Circuit held that Region V relied in good faith on regulations and letter rulings of the Department of Labor which were specifically applicable to group

homes for the mentally retarded. Petitioners do not dispute that the issue of whether Region V was entitled to invoke the good faith defense is a question of law that was reviewable de novo on appeal. Petition at 19; *See, Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923, 926 (11th Cir. 1987). The court below left intact virtually all of the district court's factual findings about the employees' working conditions, but reversed because the district court took an erroneous view of the law applicable to the good faith defense under 29 U.S.C. §259.

Many of the "significant" facts which the LSTs claim the Eighth Circuit ignored are actually irrelevant under the legal analysis adopted by the Court of Appeals. For example, the district court found that the LSTs frequently did not get an *uninterrupted* night's sleep, that interruptions were a part of their jobs, and that Region V knew or should have known about the interruptions (district ct. op. at 9,14). The Eighth Circuit simply concluded, however, that these facts were legally irrelevant to the good faith issue of conformity with the applicable regulations. Based on 29 C.F.R. §785.22, a 1985 letter ruling of the Department, and the Department's May 1985 WH Publication 1459, the court held, "the regulation plainly states that the required five hours' sleep need not be consecutive hours." 939 F.2d at 1332. The court also found its earlier decision in *Hultgren v. County of Lancaster*, 913 F.2d 498 (8th Cir. 1990), to be factually distinguishable. *Id.*

Similarly, the factual findings that the LSTs remained on the premises for the benefit of their employer and that the mentally retarded clients engaged in numerous

behaviors during the night are not, of themselves, determinative of conformity to the regulatory scheme. As the court noted:

> Region V relied upon written agency interpretations specifically addressing working conditions in the group home industry. After considerable study of the industry, the Department issued letter rulings that houseparents who work five day-four night schedules comparable to those of the Weekday LSTs do reside on the employer's premises for extended periods of time within the meaning of §785.23 and therefore may be afforded, pursuant to a written employment agreement, up to eight hours of unpaid sleep time per day in private quarters on the employer's premises. The Department's interpretation of its own regulation is reasonable on its face and is entitled to deference by the courts and contracting parties. Region V could reasonably assume that the Department was familiar with the nighttime duties of houseparents for the mentally retarded; thus, Region V's reliance upon the February 3, 1981 letter ruling in developing the work schedules contained in its Employment Agreements with the Weekday LSTs was plainly reasonable.

Id. at 1330. Petitioners also claim that the panel ignored the district court's finding that sleep-time interruptions of less than 5-8 minutes were not compensated. That is plainly not true. *Id.* at 1328.

Wage-hour cases such as this one are fact-intensive. *See, e.g., Armour & Co. v. Wantock,* 323 U.S. 126 (1944); *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). They require carefully analysis of the employees' working conditions

and the employer's actions in light of the Department's interpretations of the wage-hour law. The Eighth Circuit fully considered the petitioners' arguments and the trial court's findings, and concluded that Region V had established its good faith defense. Petitioners' objections to the treatment of the district court's factual findings do not constitute "special and important reasons" for granting a writ. *See* Rule 10.

2. The decision below does not conflict with decisions of other courts of appeals

The other issue raised by petitioners is whether the opinion below conflicts with decisions of other courts of appeal, because they claim it required "reasonable conformity" with administrative interpretations rather than "actual conformity." Petition, Issue III. Petitioners have seized upon the following sentence in a footnote in the opinion:

> But in any event, Region V's prior schedule was in reasonable conformity with the regulation and with the February 3, 1981 letter ruling.

939 F.2d at 1329, n.3. Petitioners argue that this decision is at odds with prior Eighth Circuit precedent, *Hultgren v. County of Lancaster*, 913 F.2d 498, 508 (8th Cir. 1990), and decisions in the Eleventh and Second Circuits which require "actual conformity" with administrative interpretations to show good faith reliance. *See* Petition, at 22.

Aside from this one footnote reference, there is no indication that the court below intended to apply a "lesser" standard in assessing the respondents' good faith

conformity than was used in *Hultgren* or the other circuits. Indeed, the court referred to *Hultgren*, in identifying the good faith reliance standards which it was using. 939 F.2d at 1328. Judge Magill, the only common member of the *Hultgren* panel and the panel which decided this case, joined in both decisions; the other circuit judge on the *Hultgren* panel, Judge Beam, did not vote to rehear this case en banc.

Further, the opinion below clearly shows that the court concluded that Region V's "actions actually conformed with the letters and were objectively reasonable," the test for good faith reliance adopted in *Hultgren*. 913 F.2d at 508. Rather than merely finding that Region V acted in "general good faith," *EEOC v. Home Insurance Co.*, 672 F.2d 252, 263 (2d Cir. 1982), the Eighth Circuit conducted a detailed analysis of the requirements of the wage-hour laws, as they had been interpreted by the Department, and concluded that Region V had proven conformity with the administrative interpretations as to each of the three categories of employees. Since there is no indication that the Eighth Circuit decided to apply a "lesser" standard for evaluating Region V's good faith defense under Section 259 than has been consistently applied by it and other circuits, no reason exists for the grant of certiorari.

Although factually complex, this case involves the single issue of whether the record supports dismissal of all but one of petitioners' claims, because of respondent's good faith reliance on administrative interpretations of the Department. This is an issue unique to these parties and is not important enough to warrant review.

CONCLUSION

For these reasons, the petition for a writ for certiorari should be denied.

Respectfully submitted,

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March 30, 1992